United States Senate
Republican Policy Committee
Jon Kyl, Chairman

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The Kennedy "Hate Crimes" Bill: an Unwise Proposal

In May of this year, Senator Kennedy introduced S. 966, the Local Law Enforcement Enhancement Act, commonly known as the "hate crimes" bill, and publicly pledged to ensure consideration of the bill "on the floor of the United States Senate this year."[1] This paper concludes that the legislation is constitutionally troubling and unnecessary. Further, it would lead to unintended consequences that would harm law enforcement and encourage them to become thought police. At the same time, the bill would undermine the settled moral convictions of tens of millions of Americans.

Introduction & Executive Summary

The Kennedy bill creates a new federal crime for willfully causing bodily injury to any person "because of" the actual or perceived race, color, national origin, religion, gender, sexual orientation, or disability of "any person."

Passing this bill will result in years of litigation due to its questionable constitutionality. Much of the proposed law relies on an expansive reading of the 13th Amendment, which banned slavery in the aftermath of the Civil War. Because nothing in the hate crimes bill addresses anything remotely related to slavery, courts likely will reject this claim of authority. The remainder of the bill relies on an expansive view of the Commerce Clause that violates core principles of federalism. Even bill sponsors acknowledge that the states have primary responsibility to prosecute the underlying crimes affected by this bill.

Nor is this legislation necessary. There is scant evidence that violent crimes motivated by "hate" go unpunished in the states. States already have criminal laws to prosecute the anti-social behavior addressed by the Kennedy bill — including laws against murder, rape, arson, assault and battery, etc. — and most states have passed "hate crimes" provisions, either at the guilt or punishment stage. Indeed, the murderers of highly publicized victims James Byrd (an

[1] Senator Edward Kennedy (D-MA), Press Conference, June 17, 2003, available from FDCH Political Transcripts.

African American who was dragged to death in Texas in 1998) and Matthew Shepard (a gay man who was beaten to death in Wyoming the same year) were promptly prosecuted and sentenced either to death or life in prison.

In addition to being unconstitutional and unnecessary, this legislation risks undermining local law enforcement. In practice, every interracial crime with minority victims will automatically have to be considered a possible "hate crime" — as will every crime where the victim is a homosexual, a transsexual, a transvestite, disabled, or a known member of a religion; such consideration will even extend to most crimes in which the victim is a woman. The bill would encourage police to treat victims differently depending on whether they fit into a special status created by Congress. Moreover, because the bill empowers federal prosecutors to seize jurisdiction over many local crimes at any time — and because no locality wants the federal government to announce that local police have failed in their duties — it is inevitable that local police forces will reallocate their resources. Instead of focusing solely on the most effective means to protect their community, police and prosecutors would likely give disproportionate attention to any crime that could even conceivably be covered by the Kennedy bill — only to avoid federal intervention, regardless of the impact on public safety. Congress obviously should not pass laws that promote this kind of meddling in local law enforcement.

The Kennedy bill's practical harms are compounded by the underlying ideology embodied in the bill. First, the "hate crimes" bill ensures that police and prosecutors treat identical crimes differently depending on their determination of the political, philosophical, or even religious beliefs of the offender. While this may be standard fare for totalitarian regimes, it would violate the fundamental premise of individual liberty — that the government cannot control what you think or punish you for your thoughts. Our legal system is based on identifying, capturing, and punishing criminals, and not on using the power of government to try to divine their biases.

Second, the Kennedy bill effectively establishes a "protected class" status for "gender" and "sexual orientation." The bill sponsors have made clear that the term "gender" covers "transgendered," which includes transsexuals and transvestites.[2] Tens of millions of Americans have moral objections to such sexual practices. In this regard, the Kennedy bill facilitates a political crusade to extend all race-, sex-, religion-, and disability-based civil rights protections and, thereby, declares illegitimate any moral or religious objections to homosexuality, transvestitism, or transsexuality. Inevitably, a "hate crime" law such as this one will be used to attack traditional religious faiths and groups who promote tolerance of all peoples but not acceptance of conduct traditionally regarded as sinful.

Crimes motivated by "hate" deserve vigorous prosecution, but so do crimes motivated by absolute wanton disregard for life of any kind. The proposed legislation is a step backwards, and should not be approved.

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[2] See Committee Report to S. 625, 107th Congress, #107-147, at 8 (stating that "gender" includes "transgendered-based hate crimes"); id. at 27-28 (giving examples of crimes against persons dressed up as members of the opposite sex and against transsexuals, and indicating that the Kennedy bill would apply to those crimes).

Background Facts

The Incidence of Hate Crimes Nationwide. Hate crimes, defined as "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity,"[3] represent less than one tenth of one percent of crimes committed nationwide every year.[4] In 2001, law enforcement agencies at all levels reported 9,730 hate crime incidents out of more than 11 *million* crimes.[5] Of those so-called hate crimes, only 10 were murders and the majority of the crimes against persons were crimes characterized as "intimidation," as opposed to any crime involving bodily injury.[6] Thus, while crimes such as the Byrd and Shepard murders inevitably seep into public consciousness, it is appropriate to recognize that those crimes were exceptional and extraordinary.

Existing Hate Crimes Laws. Despite the relatively few serious crimes committed every year that manifest evidence of such bias, nearly every state in the nation has adopted its own "hate crimes" law. Forty-six states either have created separate substantive offenses for committing crimes because of special statuses like race and sex, or provide for enhanced punishment for such crimes.[7] In addition to these state laws, the federal government can prosecute a narrow set of "hate crimes" under 18 U.S.C. § 245, which makes illegal any injury or intimidation of persons by force or threat of force because of their race, color, religion, or national origin in relation to their participation in a federally protected activity.[8] These crimes are in addition to the many state and federal statutes that punish *conduct* that is a part of the "hate crimes" under the Kennedy bill — such as laws against murder, rape, arson, mayhem, assault and battery, and so forth.

The Kennedy bill. The Kennedy bill, first proposed in 1997 and reintroduced again in 1999, 2001, and May 2003,[9] would add to these substantial state and federal criminal sanctions

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[3] The Hate Crimes Statistics Act of 1994, Pub. L. 103-322, title XXVIII, sec. 280003, 108 Stat. 2096.

[4] Hate Crime Statistics for 2001 and Uniform Crime Report for 2001, both available from the FBI; see also Christopher Chorba, The Danger of Federalizing Hate Crimes, 87 U. Va. L. Rev. 319, 340-341 (2001) (analyzing 1999 data). Although "intimidation" per se is not a crime, this term used by the FBI appears to capture common law assault and state law corollaries.

[5] Id.

[6] Id.

[7] See Chorba, supra n. 4, at 347-348 & n.130-132 (collecting statutes and explaining that some states have both criminal statutes and enhanced penalties).

[8] Those activities include, but are not limited to, "voting or qualifying to vote … participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States … applying for or enjoying employment, or any perquisite thereof, by any agency of the United States … participating in or enjoying the benefits of any program or activity receiving Federal financial assistance [and] enrolling in or attending any public school or public college." For an exhaustive list of federally protected activities covered under this provision, see 18 U.S.C. § 245.

[9] The bill has seen floor debate only once, in 2002, when after very little debate then-Assistant Majority Leader Harry Reid filed a cloture petition. Congressional Record, June 7, 2003. Cloture was not invoked by a vote of 54-43. Record Vote #147, 107th Cong., 2nd Sess. (June 11, 2003).

by creating a substantive federal crime where an offender "causes bodily injury to any person *because of* the actual or perceived" status of "any person."[10]

The bill creates two different offenses depending on what special "status" is involved. First, the bill creates a blanket federal crime where the offense is committed "because of the actual or perceived race, color, religion, or national origin of any person."[11] Second, if the crime is committed "because of actual or perceived religion, national origin, gender, sexual orientation, or disability of any person," then it must meet a "nexus requirement" in an effort to satisfy the Commerce Clause of the Constitution. In particular, the crime must have occurred in or must affect interstate or foreign commerce, and the bill provides a variety of ways that this could occur.[12] It is important to note that the use of the term "gender" instead of "sex" is not simply a matter of grammar or style; it is intended to include perceptions of sexual identity divorced from genetics and biology. In 2001 when the Kennedy bill was reported from the Judiciary Committee, the Democrat majority released a committee report that makes clear that it is intended to reach "transgender-based hate crimes."[13]

The Kennedy bill empowers federal prosecutors to strip local law enforcement of jurisdiction over these crimes. The Kennedy bill would permit the federal government to assert jurisdiction on the certification of any of several high-level political appointees in the Justice Department[14] that the status of "any person" was "a motivating factor" underlying the defendant's conduct.[15] After consulting with local or state law enforcement, the official can assert jurisdiction by certifying that he or she believes either that (1) the state does not currently have or intend to exercise jurisdiction ***or*** (2) the state has requested that the federal government exercise jurisdiction ***or*** (3) the state does not object to the federal exercise of jurisdiction, ***or*** (4) "the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence."[16] It takes little imagination to see that as a practical matter, the Justice Department will be able to assert jurisdiction wherever a crime has any bias-related component, no matter how distant or vague.

The Kennedy bill also contains provisions to provide technical and financial assistance to states and localities for the enforcement and prosecution of "hate crimes."[17] The proposed authorization is $5 million.

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[10] S. 966, § 7 (emphasis added). The bill also punishes "attempts to cause bodily injury" if the act involves the "use of fire, a firearm, or an explosive or incendiary device."

[11] S. 966, § 7.

[12] S. 966, § 7. As will be discussed herein, religion and national origin are repeated in each of the two provisions of the bill because bill sponsors are unsure as to whether a nexus is required in that context.

[13] See Committee Report #107-147, at 8; id. at 27-28 (giving examples of crimes against persons dressed up as members of the opposite sex, and against transsexuals and indicating that the Kennedy bill would apply to those crimes).

[14] Those Justice Department officials include the Attorney General, the Deputy Attorney General, the Associate Attorney General, and any Assistant Attorney General designated by the Attorney General.

[15] S. 966, § 7.

[16] S. 966, § 7.

[17] S. 966, §§ 4, 5, 6.

The Constitutional Weaknesses in the Kennedy Bill

Prosecutions under the Kennedy bill will face substantial legal challenges due to Congress's shaky constitutional authority to pass this legislation. Obviously the mere fact that Congress believes an issue to be of great national importance does not create the authority to pass relevant legislation, because Congress enjoys only those legislative powers that flow directly from the Constitution.[18] Bill advocates have identified two constitutional provisions to justify passing this legislation. First, the bill relies on section 2 of the 13th Amendment (which banned slavery) for violent crimes committed "because of" race, color, some religions, and national origin. The bill relies on the Commerce Clause, art. I, sec. 8, for crimes committed "because of" other religions, national origin, gender, sexual orientation, or disability.[19] Constitutional problems in these areas, as well as Congress's prudential duty to respect traditional state-federal distinctions, should dissuade the Senate from passing this legislation.

The Attempt to Stretch the 13th Amendment

The 13th Amendment banned slavery in the United States in 1865. Although the Kennedy bill does not purport to deal with slavery in any way, proponents nevertheless invoke the 13th Amendment as justification for the proposed 18 U.S.C. § 249 (a)(1), which prohibits crimes committed "because of the actual or perceived race, color, religion, or national origin of any person."

Proponents cite the 13th Amendment because the Supreme Court during the Warren Court era held that Congress had the power to enforce the ban on slavery by ensuring that "none of the 'badges and incidents' of slavery" exist.[20] Bill advocates argue that hate crimes based on race, color, and national origin are vestiges of slavery, as are crimes against persons of religious backgrounds that may have been considered "races" in 1867, i.e., Jewish persons and perhaps Arabs.[21]

The attempt to twist the 13th Amendment to fit "hate crimes" will be received skeptically by the courts. The Supreme Court does have a narrow and limited set of cases that recognize Congress's power under the 13th Amendment to eliminate the "badges and incidents" of slavery, but those "badges and incidents" were of a wholly different character than typical criminal activity as is implicated in the Kennedy bill. For example, the Court in *Jones v. Alfred H. Mayer Co.* described the "badges and incidents" of slavery as any legal hindrances to the rights to "sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens."[22] The Supreme Court later held that Congress's 13th Amendment enforcement power extends to ensuring that private actors not deprive racial minorities of "the

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[18] U.S. Const., amends. IX, X; United States v. Lopez, 514 U.S. 549 (1995).

[19] See Justice Department letter to Senator Kennedy, June 13, 2000, reprinted in full at Committee Report #107-147, at 16. The overlap for religion and national origin is explained therein.

[20] Id. at 16.

[21] Id.

[22] 392 U.S. 409, 441 (1968).

basic rights that the law secures to all men."[23] The scope of the 13th Amendment enforcement power is to remove impediments to the exercise of legal rights, not the authority to create special classes of victims for street crime.

The Kennedy bill, however, seeks to extend Congress's 13th Amendment enforcement power beyond ensuring that slavery's vestiges are removed from state or local legal systems or to ensure that private actors are not conspiring to deprive some citizens of access to their legal rights. To illustrate, the Kennedy bill effectively claims that even a battery by an Asian-American gang member against an Irish-American gang member, if done "because of" race or national origin, is actually a vestige of slavery. The Supreme Court has never extended the 13th Amendment to cover such conduct, nor is such an extension consistent with the constitutional history of the amendment. Especially because the federalization of street crime implicates federalism concerns, the Congressional Research Service and others have doubted whether the courts will be willing to approve this attempt to sanction this expansion of congressional power.[24]

The Commerce Clause and the "Nexus Requirement"

The Kennedy bill relies on the Commerce Clause for authority in those bias crimes related to religion (where the 13th Amendment will not suffice because the religion was not considered a "race" when the amendment was adopted), national origin (essentially the same), gender, sexual orientation, and disability. Unlike for the other special statuses, prosecution for any crime committed "because of" these characteristics (in "any person") must include an "explicit and discrete connection between the proscribed conduct and interstate and foreign commerce."[25]

The bill's proponents, who were supported by the Clinton Justice Department, believe that requiring the government to prove an interstate or foreign commerce nexus for each crime will make this portion of the bill constitutional. Requiring an express nexus for every case could shield this part of the bill from charges that it *directly* violates the Supreme Court's decisions in *Lopez* and *Morrison*,[26] but the Supreme Court may still find these incursions into local law enforcement anathema to traditional constitutional divisions of authority. The Supreme Court has made clear that Congress must respect "the distinction between what is truly national and what is truly local," and not pass legislation that infringes upon the latter without clear

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[23] Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).

[24] See Charles Doyle, Congressional Research Service, Hate Crimes: Summary of Selected Proposals and Congressional Authority, May 17, 2002, at 8 (questioning whether Supreme Court will accept 13th Amendment argument, especially in light of recent federalism jurisprudence embodied in Lopez and Morrison); Dan Hasenstab, Is Hate a Form of Commerce? The Questionable Constitutionality of Federal "Hate Crime" Legislation, 45 St. Louis L. J. 973, 1007-1010 (2001) (discussing weakness of 13th Amendment rationale).

[25] Justice Department Letter to Senator Kennedy, supra n. 19, at 18.

[26] United States v. Lopez, 514 U.S. 549 (1995) (holding the Gun Free Schools Act unconstitutional); United States v. Morrison, 529 U.S. 598 (2000) (holding portions of the Violence Against Women Act unconstitutional). Both cases relied on narrower views of Congress's authority to enact legislation pursuant to the Commerce Clause, and greater scrutiny of congressional findings.

authority.[27] The Court also explained that "the regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[28]

The nexus requirement in the Kennedy bill attempts to address this requirement, but courts faithfully applying the Supreme Court's rejuvenated federalism jurisprudence will not only strictly enforce the nexus, but may also challenge Congress's incursion into local law enforcement.

Congress's Independent Constitutional Obligations

The Supreme Court's distinctly-local versus distinctly-national approach raises a broader constitutional concern that the Senate should consider before enacting this legislation. The constitutionality of this measure is not just a question of whether the bill will survive a court challenge. Congress has a separate responsibility to protect the basic structure of our government, even when politically tempting legislation comes before it. Here, the bill sponsors acknowledge that this area of law enforcement is one of traditional state primacy.[29] As Chief Justice Rehnquist has warned, "the vast majority of localized criminal cases should be decided in state courts which are equipped for such matters."[30] Prudence suggests that Congress should independently guard against federal intrusion in local matters, especially absent strong evidence of state and local failure to prosecute.

The Kennedy Bill is Unnecessary and Counterproductive

The Kennedy bill is unnecessary because ample state and local laws currently exist to ensure the enforcement of crime; it is counterproductive because passing the bill is likely to distort local priorities to the detriment of public safety. Absent conclusive evidence that this law is both necessary and not harmful to local police efforts, it should not be passed.

The Bill is Unnecessary Because States Already Prosecute These Crimes

Congress should federalize local crimes only after it is plain that state and local law enforcement cannot combat those crimes on their own. That is plainly not the case here. Every state in the nation has laws against "willfully causing bodily injury" — the actual conduct outlawed in the Kennedy bill — whether through charges of murder, mayhem, assault and battery, rape, arson, and so on. Moreover, as noted above, 46 states already *have* a criminal sanction or enhanced penalty for bias-motivated crimes.[31] States are not without the legal tools necessary to prosecute and enforce local criminal activity.

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[27] Morrison, 529 U.S. at 617-618.
[28] Id. at 618.
[29] Committee Report #107-147 at 3.
[30] William Rehnquist, 1998 Year-End Report of the Federal Judiciary.
[31] See Chorba, supra n. 4, at 347-348 & n.130-132 (collecting statutes and explaining that some states have both criminal statutes and enhanced penalties).

Nor have bill advocates demonstrated that local police and prosecutors refuse to use these tools. Prudence demands that before Congress devotes federal resources to intrude into traditionally local matters, it must be established conclusively that local law enforcement has failed or that it is institutionally incapable of doing its job. The Kennedy bill has been pending for several years now, and that evidence has not been forthcoming. Indeed, it is important to note that the high-profile cases most often mentioned as "hate crimes" — for example, the homicides of James Byrd in Texas, Matthew Shepard in Wyoming, and Brandon Teena in Nebraska — all resulted in state prosecution and conviction of the murderers. There is no evidence of a nationwide epidemic of non-enforcement; to the contrary, in the most serious of cases, it is plain that local police and prosecutors take their duties very seriously.

The Bill Encourages the Misallocation of Local Resources

Advocates for "hate crimes" legislation such as the Kennedy bill sometimes argue that the federalization of street crime like assault and battery will not result in significant increases in federal prosecutions, because they argue the Kennedy bill merely would be a "backup" to local prosecution.[32] However, the advocates' assurances do not change the fact that the bill grants federal prosecutors the discretion to intervene without the permission of local police. This constant threat of intervention will affect the work of every local sheriff and prosecutor, naturally causing them to change the way they investigate and prosecute crimes, precisely in order to avoid federal intervention. In order to avoid the embarrassment of federal intervention in local business — and such associated media insinuations that the local police were indifferent to racism, sexism, homophobia, etc. — local police instead are likely to devote extraordinary attention to any potentially bias-related crime that could be subject to federal jurisdiction. Moreover, a rational police chief will encourage his police officers presumptively to treat any violent crime against *any* member of the Kennedy bill's "protected groups" as a "hate crime" until they disprove that theory conclusively. Over time, police will need to examine every interracial crime — not to mention every crime that involves an identifiable religious group, a disabled person, or even groups like effeminate men — through a different lens. Even crimes in which a woman is the victim will need to be examined as possible hate crimes. The result will be differential treatment of victims at the local level and reallocation of resources to stave off federal prosecutors — hardly a result that Congress should support.

The same perverse incentives will exist in the local prosecutor's office. Often elected and frequently politically ambitious, local prosecutors especially will be loathe to allow any case in their jurisdiction to be taken over by federal prosecutors. Behaving rationally, prosecutors will restructure priorities to ensure that any conceivable "hate crime" receives disproportionately high levels of attention, even for relatively simple cases such as assault. And, as those prosecutions progress, the savvy prosecutor is likely to be hesitant to accept the same plea bargain as he typically would, as he would risk federal intervention because a political appointee in Washington may deem the plea inadequate.

In sum, this justifiable fear of bad publicity may encourage every local police officer and prosecutor to change law enforcement strategies — not in the interest of crime prevention or public safety, but in order to avoid a highly politicized environment. Local law enforcement

[32] See Committee Report #107-147, at 24-26.

officials should be focused on finding the most dangerous criminals and locking them up, and Congress should not be passing legislation that discourages this.

The Kennedy Bill Creates a Federal "Thought Crime"

The Kennedy bill's distortion of law enforcement priorities extends beyond resource misallocations. Hate crime laws demand that the police inquire deeply into the motivation of every criminal to learn if the crime occurred "because of" bias towards a member of the legislatively protected group. By making the criminal's thoughts an *element* of the crime itself — absent the thought, there is no "hate crime" — the Kennedy bill seeks to punish the *thought itself*. Bill advocates obviously cringe at such an argument, insisting instead that they seek to punish *conduct*, not thought. But the Kennedy bill does not punish *any* conduct not already punishable or any conduct *at all* absent a politically-disfavored "thought" to accompany it. Such a law has no place in a freedom-loving nation that was founded by people fleeing persecution for their thoughts and beliefs. That their government was punishing citizens for their thoughts would be anathema to the men and women who founded this nation. As Thomas Paine said in 1780, "we hold the pure doctrines of *universal liberty of conscience*, and conceive it our duty to endeavor to secure that sacred right to others, as well as to defend it for ourselves."[33]

Bill advocates attempt to dismiss such concerns by arguing that criminal laws with *intent elements* already implicate criminals' "thought." Thus, because a killer who acts "with malice aforethought" is charged with first degree murder rather than manslaughter, his "thought" is an element of the crime.[34] But this argument conflates a very specific kind of "thought" — whether the offender actually *intended* to take the operative act, i.e, his operative state of mind at the time of the crime — with the underlying *reason* why the offender committed the act. Criminal law typically does not examine the *overall reason* that a criminal commits an act when determining whether he intended to *act* in a way that resulted in a crime being committed. Such broad questions of motivation sometimes may arise in punishment considerations, but not in the determination of whether a crime was committed — or indeed, *what* crime was committed. In short, the inquiry into an offender's overall philosophy or biases is an inquiry of an entirely different nature than whether the defendant possessed criminal intent.

Bill advocates also defend this legislation based on the naked claim that crimes committed "because of" a person's race, gender, etc. are somehow more harmful to society than identical offenses committed absent those motivations and that hate crimes legislation deters such crimes. This claim is common in "hate crime" debates, but is it true? Consider, for example, the Washington sniper shootings of October 2002: was the area less terrorized because the murder victims appear to have been chosen randomly? It could be argued that the sheer, cold immorality of randomness was at least as shocking as a crime committed because of animus towards a specially-protected group. Is society harmed any less when a child is kidnapped and sexually assaulted than when the molester selects his victim based on his or her religion? Is it necessary for us to inquire into the particular racist, sexist, or homophobic leanings of the 19 hijackers of September 11 before we can conclude that they were murderers, and is their crime

[33] Thomas Paine, The American Crisis 95 (Franklin Library 1979) (originally published 1780).
[34] Committee Report #107-147, at 24.

against this nation any greater or less depending on the answer to those hypothetical inquiries? The only difference the Kennedy bill would have had (were the hijackers able to stand trial) is that they could not have received the death penalty if convicted, because the proposed legislation contains no such punishment.

Our nation traditionally has recognized that these kinds of motivational inquiries are not only difficult, but ultimately irrelevant to whether a crime has occurred. Instead, crime-fighting should focus on *conduct*. The Kennedy bill makes philosophy, politics, biases, and general viewpoints the subject of almost every violent crime. To illustrate, consider how low the Kennedy bill sets the bar to implicate an offender's thoughts. The Kennedy bill's causation link for bias — "because of" — should give every Senator pause. Because it would be nearly impossible for any prosecutor to prove that an offender committed a "hate crime" *solely* "because of" a person's special status such as race, sex, etc., courts may interpret "because of" to require that the thought merely be "a" reason for the crime. For example, a man who batters his girlfriend in a jealous rage and who has a record of making misogynist comments about women could be prosecuted under the Kennedy bill based on past statements. And what if he used a derogatory comment about women during the assault, the prosecutor's case is even easier. What if the man's girlfriend is of a different race and he uses a racial slur during the attack? The Kennedy bill would likewise empower the federal prosecutor to argue to the jury that the single racial slur showed he committed the battery in part "because of" her race. The jury would then have to explore all the defendant's past statements and try to determine his thoughts and emotions on an obviously abstract level. Is this what juries are for?

These inquiries should simply not enter our criminal justice system. Doing so invites mischief and distorts the system's core purpose: finding and punishing criminals. There can be little doubt that hateful viewpoints exist in our nation, and it is appropriate that we condemn those viewpoints by word and sometimes action. But when those hateful people commit crimes of violence, they do not deserve any exalted status that elevates their conduct to the level of a social or political statement. They are criminals who deserve to be prosecuted and punished. The ultimate question is this: if such criminals are already being punished (and they are), is it a greater risk to society that they not be subject to a second prosecution *or* that the government will now be empowered (indeed, encouraged) to delve into the thoughts of people accused of crime?

The Kennedy Bill's Attempt to Punish Traditional Moral Values

That the Kennedy bill serves to punish thoughts *per se* is nowhere more obvious than in how, if passed, it will discredit the public mores of tens of millions of Americans on matters of sex and sexuality. The Kennedy bill includes a prohibition against "gender"-based and "sexual orientation"-based crimes. As the 2001 committee report on the bill makes clear,[35] the use of the term "gender" instead of the proper term, "sex," is a deliberate effort to extend the law's protections to cross-dressing individuals (transvestites) and those who have undergone "sex change" operations (transsexuals). Obviously a great many Americans have deeply-felt moral convictions about the behavior associated with transvestites and transsexuals, just as they do about homosexual acts. The Kennedy bill condemns those views.

The Kennedy bill places moral beliefs about homosexual, transvestite, and transsexual behavior in the same category as such universally frowned-upon viewpoints as racism, misogyny, and anti-Semitism. The bill declares that moral disapproval to be inappropriate and unacceptable. It condemns the religious beliefs of devout Christians, Jews, and Muslims who strongly believe in the teachings of their faiths, and it delegitimizes their reservations about homosexuality and unorthodox sexual practices by equating those reservations with the racist views of Nazis or Klansmen. In passing this law, Congress will encourage all of society to condemn persons with those moral reservations, *even if they abide by the law in every way*. In the area of civil rights-oriented legislation in particular, the expressive value of laws is strong and enduring. Whether fully intended or not when originally passed, the Civil Rights Act of 1964 certainly has played this socializing role. The public looks to Congress's (and the Supreme Court's) decisions to create "protected classes" and special protections for certain groups as signals that any distaste towards those groups is out of bounds. In other words, by making the Kennedy bill the law of the land, Congress would be shaping public mores and condemning those who disagree.

The moral and religious objections that many millions of Americans have towards homosexual, transsexual, and transvestite behavior ought not be compared to the marginalized and hateful viewpoints of a few on issues of race. But if Congress truly seeks such an extension of the civil rights laws to reach homosexuals, transvestites, and transsexuals, it should do so through appropriate legislation that provides for the full airing of that debate. By including these groups in hate crime legislation, advocates seek a "stealth" addition to the legislatively defined "protected classes" of the civil rights laws.

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[35] See Committee Report #107-147, at 8 (stating that bill extends to "transgendered-based hate crimes"); id. at 27-28 (giving examples of crimes against persons dressed up as members of the opposite sex, and against transsexuals and indicating that the Kennedy bill would apply to those crimes).

Conclusion

Congress should not be in the business of passing unnecessary and constitutionally suspect legislation to address fundamentally local crimes, especially where doing so threatens to undermine local law enforcement by forcing unwise reallocations of resources. Nor should Congress pass legislation that creates federal "thought crimes" that condemn the traditional moral values of tens of millions of Americans. The Kennedy bill has all these flaws and more, and should be rejected by the Senate.